

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW J. McDONALD,

Plaintiff-Appellant,

v

CARRI LYNNE McDONALD,

Defendant-Appellee.

UNPUBLISHED

November 10, 2015

No. 323693

Oakland Circuit Court

LC No. 2011-782931-DM

Before: SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

After remand from this Court, plaintiff appeals as of right the trial court's opinion and order awarding defendant attorney fees and costs in this divorce action. We affirm.

In plaintiff's prior appeal, he raised multiple issues, but the only issues before the Court now pertain to the trial court's award of attorney fees and costs to defendant and the court's alleged bias against plaintiff.

Plaintiff first argues that, after remand from this Court, the trial court again failed to make sufficient factual findings to support its attorney fees award. We disagree. We review a trial court's award of attorney fees for an abuse of discretion and any findings of fact that support the award for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012) (citation omitted). A finding is clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm conviction that a mistake was made. *Id.*

In the earlier appeal, this Court held that the record showed no evidence or factual finding to provide a basis for the award of fees. This Court then remanded the issue of attorney fees to the trial court for a finding on which basis attorney fees were awarded.¹

¹ *McDonald v McDonald*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2012 (Docket Nos. 313253/314925).

On remand, in response to this Court's opinion, the trial court stated that it was awarding attorney fees under MCR 3.206(C)(2)(b), which permits a party to obtain payment of attorney fees and expenses in a domestic relations action when the party demonstrates that the "fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." "This Court has interpreted this rule to require an award of attorney fees in a divorce action only as necessary to enable a party to prosecute or defend a suit." *Loutts*, 298 Mich App at 24. "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). This Court has allowed the award of fees incurred because of the other party's unreasonable conduct. *Id.* When awarding fees, the trial court must also determine whether the other party's conduct was causally connected to the fees incurred by the requesting party and if the fees requested were reasonable. *Reed*, 265 Mich App at 165.

On remand, the trial court stated multiple instances where plaintiff had repeatedly failed to comply with its orders regarding not exposing the children to his paramour, maintaining the status quo of marital assets, and providing discovery regarding his business valuation, income, and mental health, all of which the trial court found caused defendant to incur additional attorney fees. The court specifically identified each order that plaintiff failed to comply with that caused defendant to incur otherwise unnecessary attorney and expert witness fees. Although the trial court did not set a specific dollar amount for each of the court order violations plaintiff committed, it had previously conducted a hearing on the reasonableness of the attorney fees requested by defendant. At that time, the court made a specific finding that, pursuant to MCR 3.206(C)(2)(b) and the documented evidence submitted, except for certain work by two of defendant's attorneys that was duplicative, the attorney fees requested were "reasonable and necessary." Regarding the expert fees, the trial court found that the fees were necessary costs regarding business appraisals and the valuation of assets. Specifically, the trial court stated that "[p]laintiff failed to accept the mediated amount of valuation of several assets going into trial. In light of the inconsistent position of Plaintiff on the issue of asset valuation, the expert services retained by defendant to advocate her position [were] reasonable and necessary."

Based upon the record now before this Court, the trial court clearly stated that it awarded attorney fees and costs for expert fees to defendant based upon plaintiff's multiple failures to comply with various court orders with which he had the ability to comply under MCR 3.206(C)(2)(b). Based upon the specific instances of plaintiff's noncompliance, we find that the trial court did not err on the facts it relied upon and thus did not abuse its discretion in awarding fees in the amount designated. The trial court correctly found that plaintiff's repeated violations of court orders were responsible for defendant's incurring considerable attorney and expert fees.

Plaintiff next argues that the trial court again abused its discretion by punishing plaintiff for his request to vacate the portion of the mediation settlement pertaining to child custody and parenting time. Instead, plaintiff maintains, it was the trial court's decision to vacate the entire mediation settlement agreement that resulted in the substantial attorney and expert fees incurred at trial, and this Court had already determined that such an award was improper. We disagree.

On this issue, this Court held in its previous opinion:

The trial court's finding that plaintiff moved to "set aside the settlement and proceed to trial" was clearly erroneous. Plaintiff's February 8, 2012, motion requested only that the "consent agreement as to parenting time/child support be modified . . . and be incorporated in the parties['] Judgment of Divorce." The court's September 7, 2012, opinion and order provided that "[a]ttorney fees prior to mediation will not be considered," suggesting that the court intended to penalize plaintiff for his motion for relief from the parenting-time and child-support provisions of the settlement agreement, even though the court set aside the entire agreement and set a date for trial on its own initiative.

However, neither "resist[ing] provided requested discovery" nor moving to set aside a mediation agreement constitutes "refus[al] to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(2)(b). [*McDonald v McDonald*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2012 (Docket Nos. 313253/314925), p 9.]

In the parties' previous appeal, this Court found that the trial court's finding that the plaintiff moved to set aside the entire settlement was clearly erroneous and that moving for relief of certain provisions in a settlement agreement does not constitute a failure to comply with a court order. *Id.* On remand, the trial court clearly stated that it was awarding attorney and expert fees based upon plaintiff's multiple failures to comply with several of the court's orders pursuant to MCR 3.206(C)(2)(b). It did not state that it assessed fees as sanctions for plaintiff's conduct in moving to set aside the part of the settlement agreement pertaining to parenting time and child support. Plaintiff's argument must fail because the trial court awarded attorney and expert fees to defendant because of plaintiff's admitted failures to comply with court orders and not as a sanction for his conduct. Thus, the trial court did not abuse its discretion.

Lastly, plaintiff argues that because the trial court demonstrated its inability to set aside its previously expressed views and findings concerning plaintiff, the case should be assigned to another judge should a second remand be deemed necessary. Because this Court finds that remand is not necessary, this issue is moot and need not be decided.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood